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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| LEO B. BUENO, et al.,<br>Plaintiffs and Appellants,<br>v.<br>LEONARD BECKER, et al,<br>Defendants and Respondents. | A139196<br><br>(Alameda County<br>Super. Ct. No. RG11-563006) |

## INTRODUCTION

Appellants Leo B. Bueno, Leo F. Bueno, and Susan Viola King were represented in a personal injury lawsuit by attorney Leonard Becker (Becker), who negotiated a settlement on their behalf. They sued Becker for professional negligence and breach of contract, claiming they never agreed to settle the case. A jury found otherwise. Appellants now claim the trial court improperly instructed the jury on consent, improperly excluded evidence, and improperly interpreted the retainer agreement. We conclude none of these assertions have merit, and affirm.

## BACKGROUND

Leo B. Bueno, his father Leo F. Bueno, and his long-time companion Susan Viola King (King) were involved in an automobile accident. They hired Becker as their

attorney in regard to the accident, and signed a retainer agreement in 2007.[1] Becker filed a lawsuit on their behalf.

Becker testified there were a number of problems with the case. One was that Bueno's treating physician testified at his deposition that one of Bueno's claimed injuries was not related to the automobile accident. Becker conferred with Bueno in March, 2010 to discuss the possibility of settlement, the strengths and weaknesses of the case, and "what [Becker] perceived the realistic value of his case to be." About two weeks later, Bueno and King met Becker at his office to discuss the case again. At that time, the defendants in the accident case were offering in the "$100,000 range." Bueno indicated he did not want to accept that settlement amount, and Becker wrote him a letter suggesting he seek a second opinion from another attorney. Bueno sent Becker a letter dated April 12, 2010, stating he "was looking forward to this case going to trial."

On or around April, 19, 2010, Becker received another settlement offer of $150,000 as to Bueno's claims, $11,000 as to Susan King and $10,600 as to Leo F. Bueno. Becker communicated the offer to Bueno, and scheduled a meeting with Bueno at his office for the following day. Becker's office manager, Evelyn Mistretti, attended the meeting and took notes. Becker again discussed the strengths and weaknesses of the case with Bueno, and gave his opinion that $150,000 was "an extreme amount of money for this particular case." After "laborious discussion . . . Mr. Bueno said, 'Okay, let's settle it.'" Becker testified "at least on two separate occasions unequivocally 1,000 percent that he authorized my office to settle that case." Mistretti's notes, typed after the meeting, indicated "Before the client left LSB once again asked the client what he wanted us to do and he said to settle the case." At trial, Bueno testified he remembered meetings and conversations with Becker about settlement authority, but did not recall what was said.

Becker contacted defense counsel and accepted the offer. After defense counsel sent the release forms, Becker negotiated some changes favorable to his clients.

[1] Leo B. Bueno signed the agreement as guardian for Leo F. Bueno. Leo F. Bueno died before settlement of the case.

After the meeting between Bueno and Becker, Becker received a letter from Bueno dated April 26, 2010, in which Bueno instructed Becker to pay a bill from Dr. Hickey, one of his doctors, out of his settlement. After Becker received the revised release forms, his office attempted to set up a meeting with Bueno and King to have them signed. He met with Bueno on June 7th or 8th to go over the release form. Bueno asked if he could bring the release form home to review it, and said he would return it signed the following day. Becker agreed. Becker's office filed a request for dismissal with prejudice on June 7, 2010. By letter dated June 8th, Becker stated to opposing counsel in the personal injury case "it was agreed that we would file the Dismissal today in order for the Court to remove next week's hearing from the calendar. We have a long standing relationship with your firm and understand that once you receive the enclosed Dismissal and Release that you will request the necessary checks."

Becker had no communication with Bueno after their last meeting. Adam Gruen, an attorney, sent Becker a letter by facsimile dated June 17, 2010[2] indicating he was representing Bueno and King, and that Becker should no longer communicate with them. The letter stated that "[i]t appears you have settled their action *without their express authorization* for $150,000." One month later, Bueno signed the settlement agreement with the personal injury defendants on the same terms negotiated by Becker.

Bueno and his family members then sued Becker for professional negligence and breach of contract, claiming Becker settled the lawsuit without their consent. Becker cross-complained for attorney fees and costs under the parties' retainer agreement. Following a bifurcated trial, the jury found by special verdict that Bueno failed to prove he had not consented to the settlement, and the court awarded Becker $68,640 in attorney fees and $6844.25 in costs.[3]

[2] The letter was initially misdirected to the defense attorney in the personal injury case, who faxed it to Becker.

[3] The court granted directed verdicts on the professional negligence claims of King and Leo F. Bueno.

## DISCUSSION

*Jury Instructions on Consent to Settle*

Bueno maintains the trial court erred in instructing the jury with CACI No. 1302 regarding consent in the context of civil assault and battery: "A plaintiff may express consent by words or acts that are reasonably understood by another person as consent. [¶] A plaintiff may also express consent by silence or inaction if a reasonable person would understand that the silence or inaction intended to indicate consent." Bueno claims, without citation to any authority, that because the instruction is regarding consent as related to battery, it is "ill-fitting in contract." He proposed, instead, the following instruction: " 'Consent' is a type of agreement. [¶] For you to find that [Bueno] gave his consent to the settlement and dismissal of his case in exchange for the sum of $150,000, you must find that any consent given to [Becker] to settle and dismiss his case in exchange for $150,000 was made of his own free will, such that there was a 'meeting of the minds' between [Bueno] and [Becker] in that regard."

"We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. . . . ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) " 'We independently review claims of instructional error viewing the evidence in the light most favorable to the appellant.' [Citation.]" (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 742-743.)

Bueno does not assert CACI No. 1302 is an incorrect statement of the law. Instead, he claims "[w]hether Plaintiffs here consented to settlement is a different species of agreement. The law of battery aims to shield the body. Consent to contract by

contrast protects the mental side of human interaction; it requires a meeting of the minds."

The consent at issue here was in the form of authorizing Becker to take certain action on Bueno's behalf, not consenting to the formation of a contract between the two of them. "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.) "Actual authority arises as a consequence of conduct of the principal which causes an agent reasonably to believe that the principal consents to the agent's execution of an act on behalf of the principal. [Citations.] . . . [¶] To establish actual or ostensible authority the principal's consent need not be express. 'Agency may be implied from . . . his acts [that have] led others to believe that he has conferred authority upon an agent.' " (*Tomerlin v. Canadian Indemnity. Co*. (1964) 61 Cal.2d 638, 643-644, italics omitted.)

As the trial court explained, "I had informally come to the thinking that [CACI] 1302 was what I was going to use because of the nature of the evidence. I call it a he-said, she-said case. There aren't a lot of documents on the consent phase. . . . [¶] This is a case, both by pleading and evidence, the Court believes is not about undue influence [¶]. . . . [¶] the Court has determined based upon the evidence and the presentation that duress and undue pressure do not apply. . . ." "I think this is the best definition for this case in terms of the evidence before me. So I'm going to give 1302."

The instruction given, even though drafted for use in the context of civil battery, was an accurate definition of consent applicable to the circumstances of this case. The trial court did not err in instructing the jury with CACI 1302.

*Exclusion of Evidence*

Bueno asserts the trial court erred in excluding evidence of two statements made by Becker at his deposition. We review "any ruling by a trial court as to the admissibility of evidence for abuse of discretion, . . . including whether evidence is relevant." (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 50.)

At trial, Bueno's counsel asked Becker, in regard to why he had not advanced the costs of hiring experts in the case, "Did you feel that if you advanced costs of experts, it would be throwing good money after bad?" The court sustained Becker's counsel's objections as to relevance and scope. Bueno's counsel also asked "Did you feel that going to trial on Leo B. Bueno's case would effectively be involuntary servitude?" The court sustained the defense's objections on the grounds of relevance and scope, and noted the question was ambiguous. Bueno's counsel then sought to read certain responses from Becker's deposition, which the trial court denied.

Bueno contends the excluded testimony "was critical to Plaintiff's theory of the case that Becker settled without their consent in order to avoid committing his time and having to pay expert witnesses." (Italics omitted.) At trial, Bueno's counsel claimed the request to read the deposition answer about involuntary servitude was relevant in "that [it] ties in to the impossibility that Mr. Becker knew and set up, to pay $25,000 for experts even though you're on 800 bucks a month disability, or I don't try your case. That's my case." Counsel further claimed "My complaint . . . says Mr. Becker forced plaintiff to settle by demanding expert fees. He knew at the time plaintiff could not afford to pay." The court explained "first of all, many of those questions were irrelevant in the Court's opinion. Many danced very close to the line relative to the ruling I've already made as to the mediation privilege. And a number of them were beyond the scope of the bifurcated issue that is present at this time. [¶]. . .[¶] Having reviewed the Complaint, there is not one word that relates to Mr. Becker having threatened, cajoled, defrauded plaintiffs vis-a-vis the payment of costs as to whether he would or would not try his case."

Bueno has failed to demonstrate any abuse of discretion in excluding this evidence. Moreover, "[i]n order to obtain a reversal based on the erroneous exclusion of evidence, [Bueno] must show that a different result was probable if the evidence had been admitted." (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1223.) There was no question that Becker's professional opinion was that Bueno should accept the settlement offer. The only issue was whether Bueno consented to the settlement, and the

evidence was overwhelming that he did. Even had Bueno demonstrated abuse of discretion, there is no reasonable probability admission of Becker's statements would have resulted in a result more favorable to him.

*Attorneys Fees and Costs*

Bueno claims the court erred in awarding contingency fees and costs to Becker under the retainer agreement. He asserts Becker was entitled only to reasonable attorney fees for the time Becker spent on his case, and that "there is no basis to establish the time spent by Becker" on his behalf.

The interpretation of a contract, including an attorney retainer agreement, is reviewed de novo. (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1111.) "We review the trial court's factual findings for substantial evidence. [Citation.] Substantial evidence is evidence 'of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.' [Citation.] . . . [A]ppellants . . . bear the burden of demonstrating that there is no substantial evidence to support a challenged factual finding. . . . [¶] We view the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving all conflicts in the evidence in support of the judgment. [Citation.] We do not reweigh the evidence, consider the credibility of the witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." (*Picerne Construction Corp. v. Villas* (2016) 244 Cal.App.4th 1201, 1208-1209.)

The retainer agreement provided in pertinent part: "Client retains Attorney to represent him as his attorney . . . [¶] and agrees to pay him for his services, 33 1/3 % of the amount recovered if the case settles prior to arbitration/mediation, or 40% of case proceeds if case proceeds to arbitration/mediation, or 45% of case proceeds if case is prepared for trial. [¶]. . . [¶] I understand that I must pay Attorney reasonable Attorney's fees for the time Attorney spent on my case, and for any expenses Attorney incurred in my case, if discharge or withdrawal occurs." As to costs, the agreement also provided "I understand that I am responsible for the payment of my own medical bills and costs, whether or not I receive money from my case . . . ."

The trial court found there was a " 'defacto' discharge of counsel on or about June 17, 2011, and a formal settlement of the underlying matter here in mid[-]July by plaintiff's execution of a settlement agreement and receipt of funds . . . ." The court, applying *Fracasse v. Brent* (1972) 6 Cal.3d 784 (*Fracasse*), found the contingent fee provisions of the retainer agreement defined "what is a reasonable fee," and awarded $68,640 in attorney fees, or 40 percent of the total settlement amount for all three plaintiffs of $171,600. The court also found Becker "presented evidence of costs as defined by the contract in the amount of $6,844.25."

In *Fracasse*, the court held "an attorney discharged with or without cause is entitled to recover the reasonable value of his services rendered to the time of discharge." (*Fracasse, supra,* 6 Cal.3d at p. 792.) "To the extent that such discharge is followed by the retention of another attorney, the client will in any event be required, out of any recovery, to pay the former attorney for the reasonable value of his services. . . To the extent that such discharge occurs 'on the courthouse steps,' where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services." (*Id.* at p. 791.)

Bueno claims *Fracasse* is inapplicable because "[t]his case here has an Agreement with an express contractual provision that governs fees on discharge. *Fracasse v. Brent* did not." The express contractual provision in this case provides for reasonable attorney's fees. The opinion in *Fracasse* is relevant as to the appropriate method of measuring the "reasonable value" of an attorney's services.

The contractual provision at issue here provided for "reasonable Attorney's fees for the time Attorney spent on my case. . . ." The evidence showed Becker had represented Bueno for over three years. Becker did not keep time records because the case was being handled on a contingent basis, as were 99 percent of his cases. He estimated that his office spent "[i]n excess of 300 hours" on the case. An attorney employed by his office attended depositions in the case, and did research, law and motion work, drafted responses to subpoenas and met with the clients. Becker conducted

meetings and phone calls with Bueno, reviewed medical records in preparation for a doctor's deposition, and negotiated the terms of the settlement. Bueno ultimately signed a settlement agreement on the same terms and for the same amount negotiated by Becker. Becker testified the only difference in the agreement signed by Bueno was that his new attorney, Gruen, had crossed out Becker's name and put his own. Becker also testified to his opinion that his reasonable hourly rate would be between $400 and $550 per hour, and the reasonable hourly rate of the attorney working for him would be between $300 and $350 per hour.[4]

The trial court made the factual determination that reasonable attorney's fees in this case were equal to the amount of attorneys fees Becker would have received under the contingency portion of the agreement. The court also found "the same type of fee and costs award (arguably greater) could result here from the allocation of a reasonable hourly fee applied to the amount of effort put forth in this matter by [Becker] and staff. . . . This was a matter litigated over a three year period, and [Becker] offered evidence of the substantial amount of time spent by he and his staff. Nonetheless, the Court chooses to apply the contingent fee aspects of the contract as a reasonable fee."

Reviewing the trial court's construction of the retainer agreement de novo, we conclude the trial court did not err in equating "reasonable attorney fees" with the contingent payment under the retainer agreement that would have been due had Becker not been discharged. And, regardless of that construction, the trial court also found that the "reasonable hourly fee applied to the amount of effort put forth in this matter" would have equaled or exceeded the amount of the contingent payment. The trial court's factual determination as to the amount of reasonable attorney fees is supported by substantial evidence.[5]

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[4] Bueno also claims the agreement defines Attorney solely as Becker, not any other attorney working for his office. Even assuming that construction, Becker supervised and reviewed the work of his attorneys and staff, and performed the higher-level negotiations.

[5] Bueno also asserts the court improperly awarded attorney fees on a quantum meruit basis. It did not. The court stated, in response to Bueno's claim that quantum

Bueno next maintains that the retainer agreement "does not affirmatively state" that he was to pay costs. He notes the agreement provides that the attorney may withdraw "monies from time to time for the payment of expenses" from the amount of the initial retainer agreement, and the blank space in the agreement for the amount of the retainer is crossed out. Thus, Bueno maintains the agreement is ambiguous, and costs may not be awarded.

The retainer agreement, however, is not ambiguous. It provides: "Costs may be incurred that are reasonably necessary for my case such as long distance calls, extraordinary postage, parking, bridge tolls, filing and recording fees, obtaining medical records, or any expenses paid to anyone outside Attorney . . . I agree to pay Attorney the initial amount of $_____ dollars (a line is drawn through that blank) to be placed in a trust account from which Attorney may withdraw monies from time to time for the payment of expenses outlined above, Attorney may need additional retainers for costs and I agree to pay said amounts on demand." The agreement further provides: "I understand that I am responsible for the payment of my own medical bills and costs, whether or not I receive money from my case . . . ." Simply because Becker did not require Bueno to pay him an initial retainer fee for costs does not render the agreement ambiguous as to the payment of costs. The agreement specifically provides that Attorney may need additional amounts for costs, in this case "additional" being anything above zero, and Bueno agreed to pay "said amounts on demand."

*Form of Judgment*

Appellants contend the form of the judgment should be "[s]everal - [n]ot [j]oint and [s]everal." Becker maintains Bueno waived that claim of error.

"As a general rule, a claim of error will be deemed to have been forfeited when a party fails to bring the error to the trial court's attention by timely motion or objection. [Citations.] ' " ' "The purpose of the general doctrine of waiver [or forfeiture] is to

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meruit did not apply, that "I'm not going to use the term, and I don't believe I did, by the way, because I knew I would be having to meet and greet this argument. I use the language of the contract, which was reasonable attorneys' fees . . . ."

encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .” ’ [Citation.] ‘ “ No procedural principle is more familiar to this Court than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”. . . ’ ” ’ ” (*Avalos v. Perez* (2011) 196 Cal.App.4th 773, 776.)

At the direction of the trial court, Becker prepared and served a proposed statement of decision and proposed judgment. Bueno filed objections, but not to the judgment being joint and several. Judgment was entered against all appellants jointly. Appellants then filed a notice of intent to move for a new trial, motion to vacate the judgment, and memorandum of points and authorities. In none of those did appellants raise the issue of joint liability.

At the hearing on the motion to vacate, appellants raised the issue of joint liability for the first time. Becker’s counsel objected that “we submitted a proposed judgment; [appellants’ attorney] should have made the objection at that point in time. He had ample time to do it.” Appellants’ attorney responded “I’ll withdraw my request, and I’ll make it the subject of the appeal. I’ll withdraw the request, your Honor.” . . . [Becker’s Counsel]: “Now he’s inviting errors. . . “[Appellants’ Counsel]: “Well, which way do you want it? I’ll withdraw. If he says I’ve waived, I acquiesce. I’ve waived. I’ll withdraw it.”

Appellants forfeited their claim of error as to the joint and several form of the judgment.

## DISPOSITION

The judgment is affirmed. Respondent is entitled to his costs on appeal.

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Reardon, Acting P.J.

We concur:

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Rivera, J.

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Streeter, J.